2007

Sharlene Francisconi v. Becky Hall : Response to Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHARLENE FRANCISCONI, Plaintiff/Appellee, v. BECKY HALL, Defendant/Appellant.	**RESPONSE TO PETITION FOR REHEARING** Apeal Case No. 20070331 District Ct. No. 040922431

APPEAL FROM THE JUDGMENT AND ORDER OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, ON APRIL 3, 2007, JUDGE, PRESIDING

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Appellant asserts that the Court of Appeal exceeded its jurisdiction in that it determined matters not appealed, and holds contrary to Utah law. (Appellant's Petition for Rehearing, pg. 1) In fact, this is a misstatement of what the Court of Appeal decided in its Memorandum Decision filed May 8, 2008.

ARGUMENT

Rule 35(a) of the Utah R. of App. Proc., provides that:

> "A Petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires."

Rule 35 requires that the party petitioning the Court for a rehearing "state with particularity the points of law or fact which the . . . court overlooked or misapprehended . . " In its Petition for Rehearing, Appellant does not comply with Rule 35(a) of the Utah R. of App. Proc., in that Appellant does not state points of law or fact which were over looked or misapprehended.

In its Petition for Rehearing, Appellant asserts that "[i]n an action in rem, an order to sell the res and to discharge from the proceeds documented sums paid to acquire or

improve the res, is not final because it requires judicially supervised sale." First, the underlying action which was decided by the District Court was an Unlawful Detainer action, not an action, "*in rem*". This is acknowledged by Appellant in her Petition for Rehearing, issue number 5, page 1. Second, neither the District Court nor the Court of Appeal ever stated that the order was not final **because it requires a judicial supervised sale**. (Emphasis Added.)

That being said, the Court of Appeal implicitly concluded that the January 19, 2005 Order was not a "final order". (See Memorandum Decision, page 2-3) . Thus, the issue of whether the January 19, 2005 Order was "final" or "not final", said issue was addressed and not overlooked by the Memorandum Decision. The holding that the January 19, 2005 Order was not a final order, has become the law of this case, and is binding of BECKY HALL in all subsequent stages of litigation. (Parduhn v. Bennett, 112 P.3d 495, 501-2 (Utah 2005) *citing* Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995)

All other possible issues raised in the Appellant's statement numbered 1 through 6, are in one, or possibly all, of the following categories: (1) misstatements of the record, (2) misstatements of the facts, (3) issues not raised before the trial court, (4) issues not raised on Appellant's opening brief, and (5) issues not "overlooked or misapprehended" and thus, issues not properly the subject of a Petition for rehearing. (Appellant Petition for Rehearing, page 1).

For example, the issue numbered "2" states: "No order entered upon stipulation is ever final". That statement is a complete misstatement of the Court of Appeal's Memorandum Decision. A copy of the Court of Appeals Memorandum Decision, together with the ability to read said decision leads to the irrefutable conclusion that the Court of Appeal did not rule that, "No order entered upon stipulation is ever final".

Another example is the issue number 6, on page 2 of the Petition for Rehearing. In the paragraph numbered 6, Appellant raises the issue as follows: "6. A contract interpreted to allow one party, by anticipatory breach, to force the other party into non-compliance, then demand relief for the coerced non-compliance, is not per se unconscionable." The Court of Appeal did not overlook or misapprehend the issue of "unconscionability". Rather, the Court of Appeal decided that "we agree with the trial court that 'this is hardly an unconscionable agreement.'" (Memorandum Decision, page 8)

The conclusion that the contract is not "unconscionable" has become the law of this case, and is binding of BECKY HALL in all subsequent stages of litigation. Parduhn v. Bennett, 112 P.3d 495, 501-2 (Utah 2005) *citing* Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995)

All of the other statements in the issues numbered as 1 through 6, are misstatements of the record or misstatements of the facts. As such, they are not the points of law or fact which the court has overlooked or misapprehended.

CONCLUSION

The Court should deny Appellant's Petition for Rehearing.

DATED this 13 day of June, 2008.

Gregory M. Constantino
Attorney for Appellee SHARLENE FRANCISCONI

CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the foregoing **RESPONSE TO PETITION FOR RE-HEARING** was, this 13 day of June, 2008, mailed, postage pre-paid, to:

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